

PBPA Podcast Transcript
Episode 20 – Solicitors, Consultants & Grant-writers:
Legal Considerations for Working with Third-Party Fundraisers
(17:15 minutes)



Sireesha ([00:00](#)):

Do you, or are you considering, working with a third party fundraiser, such as a grant writer or fundraising consultant? The idea of working with a professional seasoned fundraiser may sound like a great option. They can have years of experience under their belts, running campaigns, writing grants, or managing donors for nonprofits. There are a few things your nonprofit should keep in mind, though, before you work with a fundraiser, to help ensure legal compliance while aligning both sides' interests. In this episode of the PBPA Podcast, Justine Cowan will share some legal and ethical considerations of working with fundraisers.

Sireesha ([00:44](#)):

Hello and welcome to the PBPA Podcast. In each episode of the PBPA Podcast, we explore legal questions relevant to Georgia nonprofits. I'm your host Sireesha Ghanta, Counsel and Education Director at the Pro Bono Partnership of Atlanta. PBPA strengthens our community by engaging volunteer attorneys to provide nonprofits with free business legal services. We provide numerous free resources via our website, including articles and webcasts specific to Georgia nonprofits and their business legal concerns. We also provide direct legal services to our clients. For more information on client eligibility requirements, to apply to be a client or to access our vast learning center, visit our website at [pbpatl.org](#). Before we jump into this episode's topic, keep in mind that this podcast is general information, not legal counsel, contact your attorney for guidance on your nonprofits' specific situation.

Sireesha ([01:57](#)):

Justin Cowan is corporate counsel at the Pro Bono Partnership of Atlanta. She herself has also served as an executive director of a nonprofit, so she has not just the legal insight, but also a great deal of practical experience working with fundraisers. Thanks for joining us today, Justine.

Justine ([02:15](#)):

Nice to be here.

Sireesha ([02:17](#)):

So nonprofits often hire professional fundraisers or contractors to help with fundraising or selling sponsorships. Let's start first with definitions. What is the difference between a professional fundraiser, a fundraising consultant and a grant writer?

Justine ([02:35](#)):

Well, I'm going to use the terminology that the Secretary of State uses, and that, the first one I'm going to talk about is a solicitor, which is basically a professional fundraiser. And this is someone who is hired by a charity to raise money. And that person asks for the money directly, and may have custody or control of the funds or the nonprofit. So for example, when you get phone calls, asking you for funds, those are solicitors. But it doesn't have to be by telephone. Even if you hire someone to ask money for just one of your donors, that person is a solicitor. The second type of fundraiser is a consultant and a consultant advises a nonprofit on how to raise funds, perhaps working with the board, creating

fundraising plans. They might even prepare some fundraising materials or conduct board trainings on how to fundraise. But they generally do not ask for the donations, but advise you on how to make those asks. And then the third category we're going to talk about today are grant writers, which is pretty, self-evident what that means. Those are the ones that I'm write a grant application for you to submit to a foundation or to a government agency. Now, just to clarify, what we're not talking about today is we're not going to talk about paid staff, such as the executive director or development director, nor are we talking about board members or volunteers, because those are not under the scheme of charitable solicitation, that Secretary of State regulates.

Sireesha ([04:11](#)):

So, you mentioned solicitation and the secretary of state. Tell me more about how and why the State is a part of this conversation about third-party fundraisers,

Justine ([04:22](#)):

The Secretary of State regulates charitable fundraising. And most of you listening here today should probably be registered to fundraise with the secretary of state. There are, are some exceptions. Um, we're not gonna go into those today. Um, we have a great article on our website that discusses all of that. Um, if you want to find out more about that, but in addition to regulating the charities, the state also regulates those who ask for money on behalf of the charities, um, or the solicitors that we've been talking about. Um, unfortunately this is an industry where there have been a lot of high profile scams, even on a national level. And because of that, the Secretary of State requires that solicitors be registered, that they go through background checks and they might even have to submit a bond to the state. Um, and the application is pretty time-consuming and very thorough.

Justine ([05:13](#)):

And so if you hire a solicitor, you also have to have a contract and that contract has to be submitted to the state and it outlines the parties' obligations, it sets compensation, and who pays for campaign expenses. Now the second category we talked about the consultants, there's no registration required for a consultant in Georgia, unless that consultant asks for the money personally or handles the money in any way. So it's important that if you hire a consultant to make sure that they're not asking for any funds, because that will convert them into a solicitor. The grant writers, again, they also are not regulated by the Secretary of State because they don't, they're not actually asking for the money. At least I hope not. You should be submitting the grant applications yourself. Now I should say that other states can handle these things differently. So for example, in Florida, even consultants have to register. Um, but here in Georgia, as long as they don't handle the funds, um, they don't have to register.

Sireesha ([06:18](#)):

Got it. So nonprofits can choose between a solicitor or a consultant or a grant writer to help with fundraising. But can you tell me just factors to consider in deciding which one of these three options to work with?

Justine ([06:33](#)):

Understanding why you truly need to hire someone is important fundraising at the end of the day is a board function. The board has a fiscal responsibility to ensure that there's adequate funds to run the organization's programs. And of course there's staff involved is a joint effort. So the first question that I ask a client that comes to me and says, you know, "Should I hire a solicitor or a consultant?" is, I want to

know if you're avoiding any sort of internal problem that's going on in the organization. Um, unfortunately there's no quick fix to fundraising. All nonprofits have to do it. And if you are taking an essential function of fundraising and trying to outsource that, then, um, I would not recommend hiring a solicitor. Um, in that case, I would recommend hiring a consultant, so that the consultant can come in and work with your board and staff and train them on the essential responsibilities of the board and do some board job descriptions and get some really good fundraising plans into place.

Justine ([07:40](#)):

Now, whether or not you should hire a solicitor. I know when I was an executive director, let's be honest, I did not like asking for money. And the thought of hiring somebody to ask money for me is to have it so good. But if you hire solicitor, the first thing is there's going to be that contract that's going to be submitted to the State and there's going to be lots of different requirements. And the second thing is that donor cultivation is really an internal function of an organization, connecting with your donors, keeping them up to date on what you're doing and really having, developing that relationship. I do think that a solicitor might help in certain circumstances where you just need a little extra help: you have an event and you don't have the capacity to do certain level of fundraising. So there are situations where I'm a solicitor can be a good idea.

Justine ([08:31](#)):

Most of the time nonprofit is probably going to be hiring a consultant. And in fact, I encourage that at some point in an organization's development that they hire a consultant to make sure that they're really incorporating the best practices that you can do for fundraising. Also with, now forming out grant writing can also be a good, a good option if you're understaffed, but again, be very specific about what the role is for that grant writer. And whether or not you're farming out the essential responsibilities of developing a relationships with the foundation. So I like to use a grant writer to just really do a lot of the core writing, but maintain the rest of the relationship with the foundation and the submissions and all of that. Now, once you've decided on what you're going to, what type of person you're going to hire to help you, be very careful and really dig in deep on references and referrals. There are a lot of scams out there. This is really an industry where there are some issues. Anyone can hang out a shingle and say, I'm a consultant. And so I really encourage you to check references and do your due diligence before hiring somebody.

Sireesha ([09:48](#)):

So, once a nonprofit decides what type of third-party fundraiser they're going to hire, and they have done their due diligence and vetted the person that they're going to hire, the State requires a contract for solicitors. Is that right?

Justine ([10:05](#)):

Yes.

Sireesha ([10:07](#)):

If you don't have a solicitor, if you just have a consultant or a grant writer, does the nonprofit still need a contract?

Justine ([10:14](#)):

Well, it's not required by law. However, I would never work with a consultant or a grant writer or anyone that's engaged in any sort of fundraising activity for my nonprofit, without a contract. It's important to outline expectations, milestones, the payment schedule also consider that this person might be working with confidential information, your donor lists, um, and they're going to have access to that. They might be working with other nonprofits. The donor list is a very important asset of your organization. You need to protect the confidentiality of that information. And then you also just need other basic clauses like termination clauses, whether or not they can use your logo, how things get approved and work expectations. All those things should be ironed out before you work with somebody.

Sireesha ([11:03](#)):

Okay. And you mentioned the payment schedule that would be included in the contract. Um, well, let's talk more about fees. What about if the nonprofit wants to incentivize their fundraising efforts? The more the fundraiser raises, the more they can be paid? Are there any problems with that?

Justine ([11:23](#)):

I get this question a lot, because it sounds like such a great idea that you incentivize fundraising by providing a percentage. It sounds, you know, there's a lot of commissions out there in the world and, and salespeople have commissions and why can't we do that in fundraising? So the first issue is whether or not the IRS is going to have a particular problem with that arrangement. So it's not per se illegal, but it's going to be scrutinized by the IRS. And what they're going to be looking for is whether or not there's an improper, private benefit. Your nonprofit is set up for public benefit, but a private benefit is where there's an individual that receives more than an incidental benefit from the organization, that's not part of conducting the organization's mission. And fundraising is not technically part of your programming services. So let's say for example, you have a fundraiser and you, they go out and they raise a million dollars in a year, and that's just wonderful music to your ears.

Justine ([12:29](#)):

And they get paid 15% of that. Well, you're getting a lot of funds from that. And so that's very exciting for your nonprofit. But this fundraisers getting \$150,000. And so maybe it might be worth it to you, but that person might be making more than your CEO. And that would be inappropriate from the IRS perspective.

Justine ([12:51](#)):

This is an area where you see a lot of scams. And so the State is also going to be very concerned about that. And some state regulations actually look very closely at the percentage that a fundraiser can receive if that's the setup that you have. But even if it's legal, the second question is, is it ethical. The Association of Fundraising Professionals, which is the largest organization for this type of profession has very specific standards in this regard. And they require that all of its members adhere to a code of ethical principles and standards, and they have found that percentage based compensation and finder's fees, "encourage abuse, imperil the integrity of the voluntary sector sector and undermine the philanthropic values upon which it is based." And that's from their code of ethics. And they are very clear that members should not accept compensation or enter into contracts. That's based on percentage of contributions and its members should not accept finder's fees or contingent fees. And so our advice is unequivocal that we do not support percentage based compensation, even if you might be able to find a way to do it legally.

Sireesha ([14:12](#)):

Okay. So that's for the fundraising professionals, but what about for grant writers? Is it a problem to base their compensation on a percentage of contributions or contingencies?

Justine ([14:24](#)):

Well, you're still going to have the same Association of Fundraising Professionals, ethical restrictions, but you also have to think about transparency with the foundation that might be giving you a grant. For example, you might be putting in a budget I would expect, and that budget would let them know how you're going to spend their funds. And if you do not, if the line item for fundraising might change, depending on how much the grant you get and whether or not it's successful, you know, are you really being transparent with the foundation? I'm also going to let you know that most foundations, if not all, are not going to look favorably on that sort of arrangement.

Sireesha ([15:09](#)):

Ah, okay. So then how should a nonprofit pay them and how can they reward a fundraiser's hard work?

Justine ([15:17](#)):

There's nothing wrong with incentivizing good performance. But the way that it should be done is based on performance-based measurables. So the association for fundraising professionals is actually clear about this, that members "shall be permitted to accept performance-based compensation, such as bonuses". And what I would encourage each nonprofit to do is really think about the compensation that you're giving your employees throughout the nonprofit and how you're going to incentivize good work. And you can come up with a bonus program that rewards employees for good work.

Sireesha ([15:57](#)):

Thank you. And just a note to our listeners, I will include a couple of resources related to contracts on the webpage for this episode, so that you can have a little more background. And we definitely encourage you to follow up with your attorney, um, whether you're a PB PA client or not so that they can review any agreements with third-party fundraisers, as Justine mentioned. Justine, thank you so much for outlining these legal considerations around working with professional solicitors, fundraising consultants and grant writers. We appreciate you taking the time to answer our questions today.

Sireesha ([16:34](#)):

We hope that you found this episode of the PBPA Podcast to be informative and helpful. We add new episodes every month with short conversations about general, yet important legal information for Georgia nonprofits. Remember that this is not legal counsel. Talk to your attorney about your organization's specific concerns. Thanks for tuning into the PBPA Podcast. And to all nonprofits listening out there, thank you for all the good work you continue to do in our community.